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December 2, 2009

George Thompson
General Counsel
Indiana Department of Homeland Security
302 West Washington Street
Indianapolis, IN 46204

Re: *Informal Inquiry 09-INF-30; Homeland Security District Planning Oversight Committees and District Planning Councils*

Dear Mr. Thompson:

This is in response to your informal inquiry dated August 5, 2009. I apologize for the delayed response. I took office in September of this year and found a backlog of informal inquiries at that time. I am currently endeavoring to work through the backlog and appreciate your patience in waiting for this opinion.

Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry regarding whether a Homeland Security District Planning Oversight Committee ("DPOC") or a District Planning Council ("DPC") is subject to the Indiana Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.* My opinion is based on applicable provisions of the ODL.

BACKGROUND

I summarize the relevant facts in your informal inquiry as follows: The District Planning Council Program ("Program") was developed in 2005 via a joint initiative of the Indiana Department of Homeland Security, the Indiana State Department of Health, and the Counterterrorism and Security Council. Five or more Indiana counties comprise Homeland Security Districts, which will work together and assist each other in regional planning.

DPOCs and DPCs (collectively the "Coalitions") are formed as coalitions rather than by any statute or regulation. They are not legal entities and any decisions made by them are not binding on any political subdivision of the State. Before any decision of either a DPOC or DPC can be implemented, a governmental entity such as a city or county must take its own independent action. The purpose of the Coalitions is to prepare

for events or threats that are multi-jurisdictional in nature. The Coalitions are not providers of services or emergency responses.

The Indiana Department of Homeland Security and the Indiana State Department of Health have developed guidance that is intended to assist local elected officials and local emergency management officials in forming the Coalitions throughout the State. Under that guidance, the program consists of two components. The first is a DPC, which has a voting membership consisting of the emergency management agency director for each county in the district, one member appointed by each member county's board of commissioners, and one member appointed by the mayor or town board president of the most populous city or town in that member county. DPCs also have various non-voting members. DPCs are responsible for developing regional emergency response strategies, plans and procedures for the district. Second, the DPOC membership consists of the mayor of the largest city or town from each county in the district and the president of the county commissioners. The primary responsibility of the DPOC members is to formally appoint the members of the DPC and provide executive oversight, support and guidance for the DPC's activities.

You argue that neither Coalition is a "public agency" or "governing body of a public agency" within the meaning of section 2 of the ODL. In support of your view, you note the following facts: neither Coalition is required or specifically authorized by any Indiana statute; they are not created by any ordinance or executive order to advise a governing body of a public agency; they do not exercise any portion of the executive or administrative power of the State; the actions taken and decisions made by the Coalitions are not binding on any unit of government; the Coalitions are neither subject to a budget review by the Indiana Department of Local Government Finance or the governing body of any public agency, nor are they subject to an audit by the State Board of Accounts; and neither Coalition is a "committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated" because the various public agencies who have appointed members to a Coalition have not delegated to them the authority to take official action upon the public business of the public agency.

ANALYSIS

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. I.C. § 5-14-1.5-1. Thus, the ODL requires that all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. I.C. § 5-14-1.5-3(a).

The initial question is whether the Coalitions constitute public agencies, the governing body of which would be subject to the meeting requirements of the ODL. The ODL defines a "public agency" as, among other things, "[a]ny advisory commission, committee, or body created by statute, ordinance, or executive order to advise the

governing body of a public agency...." I.C. §5-14-1.5-2(a)(5). Any entity that is "subject to . . . audit by the state board of accounts that is required by statute, rule, or regulation" would likewise be a "public agency" under the ODL. I.C. §5-14-1.5-2(a)(3)(B). The plaintiff in a lawsuit under the ODL has the burden of proving that the defendant entity is a "public agency" within the meaning of the statute. *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999).

Here, it appears that the Coalitions were not created by any statute, ordinance, or executive order. Moreover, neither the DPC nor the DPOC is subject to audit by the State Board of Accounts. If these facts change in the future, the Coalitions might be considered public agencies at that time. However, based on the information before me, it is my opinion that the Coalitions are not public agencies for purposes of the ODL.

The second question is whether or not either Coalition constitutes a "governing body" of some other public agency. If so, it would be subject to the ODL, which defines a "governing body" as "any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated." I.C. § 5-14-1.5-2(b)(3). An argument could be made that the Coalitions are governing bodies because members of each Coalition are appointed by presiding officers of various governing bodies: presidents of town boards, presidents of county boards of commissioners, etc. However, the plain language of the statute does not lead to that result because section 2(b)(3) refers to a *committee* that is appointed by the presiding officer of a governing body rather than committees *to which a single member* is appointed by the presiding officer of a governing body.¹ As I understand the Coalitions, some presiding officers of various governing bodies appoint individual members of each Coalition, but no presiding officer directly appoints the entire Coalition (i.e., all of its members). In my opinion, such circumstances do not trigger the application of section 2(b)(3) because no governing body or presiding officer of a governing body has directly appointed any committee; they have only appointed individual members of the various Coalitions. Thus, it is my opinion that the Coalitions are not subject to the ODL because neither is a "committee appointed directly by the governing body or its presiding officer." I.C. § 5-14-1.5-2(b)(3).

¹ Indiana courts seem to have construed section 2(b)(3) narrowly. See, e.g., *Robinson v. Indiana University*, 638 N.E.2d 435 (Ind. Ct. App. 1994). *Robinson* was decided after the General Assembly amended the definition of "governing body" to add the word "directly" after "any committee appointed." In *Robinson*, the Indiana University's Board of Trustees (a governing body for ODL purposes) delegated the authority to appoint a committee and subcommittee to the university president who, in turn, passed the duty on to an associate vice president for research. *Id.* at 437. The court held that "the Committee and Subcommittee did not derive their authority *directly* from the governing body" because the board delegated its appointment authority to the university administration. *Id.* at 438. Consequently, the committee and subcommittee were not governing bodies under the ODL. *Id.* at 437-38.

CONCLUSION

For the foregoing reasons, it is my opinion that the Coalitions are neither public agencies nor governing bodies of public agencies within the meaning of the ODL.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, stylized 'A' and 'K'.

Andrew J. Kossack
Public Access Counselor